UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

FOSTER FARMS, INC.,
Employer

and **Case 32-RC-5539**

UNITED FOOD AND COMMERCIAL WORKERS 8 GOLDEN STATE,
Petitioner

Steven R. Feldstein, Esq., Menlo Park, California, for the Employer
Donald C. Carroll, Esq., San Francisco, California, for the Petitioner

REPORT AND RECOMMENDATIONS

On November 13, 2007,[1] United Food and Commercial Workers 8 Golden State (Petitioner) filed a Petition for Certification of Representative seeking to represent a unit of production and maintenance employees at the Porterville, California facility of Foster Farms, Inc. (Employer).

The Employer, a California corporation with its principal office located in Livingston, California, is engaged in the processing of poultry at its Porterville, California facility. From November 28, 2006 to November 28, 2007, the Employer shipped and sold poultry products valued in excess of $50,000 to firms located outside the State of California. The Employer admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Employer admits, and I find, that Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

Pursuant to a Stipulated Election Agreement, approved on November 28, a secret ballot election was conducted on December 13 in the following appropriate unit:

> All full-time and regular part-time production and sanitation employees, receiving clerks, forklift drivers, stackers, and lead employees employed by the Employer at its Porterville, California facility; excluding all managerial and administrative employees, quality control employees, maintenance employees, shipping clerks, salespersons, office clerical employees, all other employees, guards, and supervisors as defined in the Act.

The Tally of Ballots reflected that of the approximately 331 eligible voters, 75 votes were cast for the Petitioner, 204 were cast against Petitioner, and 25 ballots, an insufficient number to affect the election results, were challenged. Following the election, Petitioner filed timely objections to conduct affecting the election. Pursuant to the Acting Regional Director's Report on Objections and Notice of Hearing issued February 29, 2008, certain of these objections have

[1] All dates are in 2007 unless otherwise referenced.

been referred for hearing. The hearing was conducted on March 20 and 21, 2008, in Porterville, California.

All parties were afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue the merits of their respective positions. On the entire record,[2] including my observation of the demeanor of the witnesses,[3] and after considering the briefs filed by Petitioner and Employer, I make the following findings of fact and recommendations.

Objection 5

> The Employer through its then Plant Manager Paul Bravinder on or about November 20 invited employees to come to him with any complaints that they had with their working conditions.

Reading from scripted talking points, plant manager Paul Bravinder[4] conducted four to six meetings on November 20. After each bulleted item, Bravinder paused and his prior statement was translated into Spanish by Tessie Molina, human resources manager for the Porterville facility. Bravinder agreed that he read the following sentence: "Porterville employees, like all non-Union employees, enjoy an open door policy to resolve concerns." Bravinder agreed that at each meeting held that day, he diverted from the scripted message to add his personal experience that when he worked at a unionized plant, it took much longer to resolve disputes than the non-union method of employees sitting down with management and resolving problems at the time of the occurrence. Bravinder denied that he invited employees to bring problems to him (other than the sentence quoted above) or said anything about fixing employees' problems.

Bravinder's testimony was corroborated by Tessie Molina. Additionally, Molina testified that she faithfully interpreted Bravinder's words into Spanish using the scripted talking points. An employee fluent in both Spanish and English testified that Molina's translation of Bravinder's speech was accurate and that Molina did not add any additional comments or deviate from Bravinder's statements. This employee recalled that Bravinder told employees it was more comfortable to have an open door policy than a third party, a Union. Bravinder told employees that they should not be afraid to come to management with their thoughts, feelings, or anything on their minds. Another employee presented by the Employer recalled that Molina stated that the Employer had an open door policy for employee problems and employees did not need a third party to mediate.

There is no dispute that the Employer maintained an open door policy at least several years prior to the filing of the petition herein. It is contained in an employee

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[2] Petitioner's unopposed motion to correct the transcript is granted.

[3] Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

[4] At the time of the speech, Bravinder was an admitted supervisor and agent of the Employer within the meaning of Sec. 2(11) and 2(13) of the Act. He left employment with the Employer shortly thereafter.

handbook and human resources manager Molina routinely communicated the policy to all new hires.

Although the exact language from the handbook was not submitted at the hearing, anecdotal evidence about the use of the procedure was. For instance, on one occasion Jose Rodriguez utilized the open door policy to complain about bad treatment. He was aware of the open door policy throughout his 5-year employment with the Employer. Rosalinda Nevarez utilized the open door policy throughout her employment. At times she met with Irma Hernandez in human resources and at other times she met with Bravinder. Nevarez recalled that about two years prior to the hearing, she met with Bravinder about a foreman.

Petitioner presented witnesses who testified that Bravinder, through Molina, stated that employees should come directly to him. A third party was not necessary for resolving problems. One witness testified that Bravinder said, "if you guys have problems, come to me, I can help you, myself or Tessie." Another recalled that Bravinder stated, "we could go directly to him to resolve [complaints]. That we don't need a third person to help us resolve our problems." Another witness testified that Bravinder said, "you guys can come with me with your problem and I'm going to try to resolve it but, I'm going to be leaving soon."

To the extent there is discrepancy between Petitioner's and Employer's witnesses on this issue, I credit the testimony of Bravinder and Molina and find that employees were reminded that they had an existing open door policy to resolve their concerns. My credibility finding is based on the uncontroverted testimony of Bravinder and Molina that there was no deviation from the scripted remarks, except that Bravinder told employees that he thought the open door policy was more expeditious than dealing with a union about employee concerns.

I find that these statements did not interfere with the conduct of the election. In the absence of a pre-existing open door policy, solicitation of employee grievances during an election campaign tends to restrain and coerce employees when the employer promises to remedy those grievances. *Uarco, Inc.,* 216 NLRB 1, 2 (1974). "The solicitation of grievances alone is not unlawful, but it raises an inference that the employer is promising to remedy the grievances." *Center Service System Division,* 345 NLRB 729, 730 (2005), enfd. in relevant part, 482 F.3d 425 (6th Cir. 2007). However, when an employer utilizes an open door policy prior to the beginning of a union campaign, the employer may lawfully continue the policy during the campaign provided it does not significantly alter "its past manner and methods of solicitation during the campaign." *Center Service System Division, supra,* 245 NLRB at 730, citing *House of Raeford Farms,* 308 NLRB 568, 569 (1992), enfd. mem. 7 F.3d 223 (4th Cir. 1993), cert. denied 511 U.S. 1030 (1994).[5]

There is no evidence that Bravinder's remarks altered the contours of the open door policy as it existed prior to the election campaign. That is, the record reflects that employees were free both before and during the election campaign to consult Bravinder in order to resolve their concerns. Thus, I recommend that Petitioner's Objection 5 be overruled.

[5] See also, *PYA/Monarch, Inc.,* 275 NLRB 1194, 1195-1196 (1985); *Butler Shoes New York, Inc.,* 263 NLRB 1031 (1982), relied upon by Employer.

Objection 6

> On December 4 and December 11 . . . the Employer held general meetings with the employees in which the Employer threatened employees with a reduction of wages and a loss of health insurance and retirement benefits as well as with elimination of bonuses if the Union was elected. The employer also threatened to bargain from zero with the Union if the Union was elected.

The Employer held a series of meetings on December 4 and 11. About 20-40 employees, typically those in one department or line, attended each meeting. Approximately seven meetings were held on both the 4th and 11th. The meetings were conducted by Ritchie King, vice president of chicken operations.[6] King spoke in English, reading from prepared charts. The charts were positioned in the front of the room and were in both English and Spanish. When King finished reading a page of the English chart, his speech was repeated in Spanish by Becky Reyes, a human resources supervisor, who read the corresponding Spanish chart. Neither King nor Reyes regularly worked in the Porterville facility.

A portion of the presentation dealt with comparison of wages and benefits at two Unionized facilities of Respondent to the wages and benefits at the Porterville non-Union facility. The charts reflected that the Unionized facilities had lower wages, lower wage increases, higher medical plan deductibles and less medical coverage, different retirement benefits, and no bonuses.

Petitioner presented witnesses who attended the December 4 and 11 meetings. Uniformly, they testified that the Employer threatened employees with a reduction of wages, loss of health insurance, retirement benefits, and bonuses if the Union was elected. As to bargaining from zero, witnesses testified that the Employer threatened to bargain from zero: "Well, they said that if the Union came in, they were going to lower wages. That we were going to start from the bottom, from minimum." Another witness testified that if the Union came in, "the wages were going to be diminished to the minimum."

Petitioner's witnesses either denied or could not recall that the Employer's speeches explained that items such as wages, health insurance, retirement benefits, and bonuses were subject to negotiation. However, one of the witnesses understood the Employer's speech to say, "Well, they only said that the Union could only give what the company accepted to give. That if the company did not accept to give, the Union cannot give."

The Employer produced the original English and Spanish-language charts. The December 4 charts stated that the Union could only receive what the Employer agreed to. The December 11 charts stated as to wages, medical benefits and retirement benefits, "It is negotiable . . . benefits may go down, not change, go up . . . but History says NO." Petitioner's witnesses recognized some of the pages of these charts but disputed the accuracy of other pages of the charts or data on those pages. On the other hand, the Employer produced employee and management witnesses who attended the

[6] King is an admitted supervisor and agent of the Employer within the meaning of Sec. 2(11) and 2(13) of the Act.

same meetings. The Employer's witnesses agreed that the charts at the hearing were identical to the charts at the meetings.

Additionally, the Employer's witnesses testified that both King and Reyes stated, "The UFCW Union can only receive what Foster Farms agrees to." These witnesses did not hear King or Reyes state that medical benefits would be taken away or that wages would be reduced. Neither King nor Reyes said that employee pension or retirement plans would be eliminated. Neither said the Employer would cease making contributions to the 401(k) plan. Neither said employees would lose bonuses if the Union came in. When employees asked questions about wages or benefits, the response was uniformly that these items could go up, down, or stay the same. These were negotiable items and the answer would depend on what happened at the bargaining table. Similarly, King and Reyes testified that no threat of loss of benefits or reduction of wages was made and that the often repeated phrase in response to questions was, "It could go up, down, or stay the same. Everything is negotiable."

Of course, threats of wage reduction and loss of benefits constitute objectionable conduct affecting the results of an election. See, e.g., *Interstate Truck Parts,* 312 NLRB 661, 661, 663 (1993), enfd. mem 52 F.3d 316 (3d Cir. 1995)(threat to reduce wages and benefits reasonably tended to interfere with employees rights under the Act); *Truss-Span Co.,* 236 NLRB 50 (1978), enfd. in relevant part, 606 F.2d 266 (9th Cir. 1979) (threat to eliminate pension and profit sharing plans interfered with conduct of election). Certainly, statements about bargaining from zero should the Union win an election may constitute objectionable conduct if conveyed as a threat that wages will depend "in large measure upon what the Union can induce the employer to restore." See, e.g., *Federated Logistics & Operations,* 340 NLRB 255 (2003), enfd. 400 F.3d 920 (D.C. Cir. 2005).

However, based on the record as a whole, I find that no such objectionable conduct occurred. Although Petitioner's witnesses displayed credible demeanors and appeared to be honestly convinced that they had been threatened, I find that the Employer's witnesses' testimony and demonstrative evidence belies the recollections of Petitioner's witnesses. Thus, Respondent's documentary evidence, utilized at the December 4 and 11 meetings, demonstrates that Porterville wages are higher than two other Employer facilities, both of which are unionized. Perhaps Petitioner's witnesses assumed that if they selected the Union, their wages would be the same as the two unionized facilities. However, I find that this was not communicated to the employees by King and Reyes. Similarly, I credit the testimony of King, Reyes, and other Employer witnesses that there were no statements that employees would lose health benefits, bonuses, or retirement plans or that the Employer would bargain from zero. Thus, I recommend that Petitioner's Objection 6 be overruled.

Objection No. 1

The Employer distributed to employees a sample ballot which did not comply in Spanish or Laotian with the Board's decision in *Ryder Memorial Hospital*, 351 NLRB No. 26. The parties stipulated that the election should be conducted in Spanish and Laotian as well as English.

In *Ryder Memorial Hospital,*[7] the Board altered its official ballot as part of its effort to conclusively cease case-by-case analysis of whether voters might be misled by partisan use of official ballots during pre-election campaigns.[8] Specifically, the Board added a two-sentence disclaimer to its official ballots, as follows:

> The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.

The Board also announced that if, as part of pre-election propaganda, a party utilized facsimiles of official Board ballots in the future, the two-sentence disclaimer must be present on the ballot or a new election will be ordered.[9] As the Board stated,

> This explicit disclaimer language will appear on both the actual ballots cast by employees in the election and the sample ballot contained on the Notice of Election, and is in addition to the existing disclaimer language on the bottom of the Notice of Election. We believe that this modification to the ballot will effectively preclude any reasonable inference that the Board favors or endorses any choice in the election. That is, as any actual reproduction of the Board's sample ballot will necessarily include the foregoing disclaimer language, employees will not reasonably be misled into believing that the Board supports a particular party, whether or not the reproduced ballot contains additional markings or promotes that party's cause.

Turning to the facts herein, as part of its election propaganda, the Employer prominently posted and broadly distributed leaflets containing reproductions of NLRB ballots. This occurred during the week of the election. The "NO" box was marked with an "X" on the sample ballot portion of the leaflet. The leaflets were in both Spanish and English. None of the leaflets was in Laotian. The sample ballot portion of both the Spanish and English leaflets was in English only, regardless of whether the sample ballot was contained in a Spanish or English leaflet.[10]

Pursuant to the stipulated election agreement, official ballots were printed in English, Spanish, and Laotian. Moreover, Notices of Election were printed in English, Spanish, and

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[7] 351 NLRB No. 26 (2007).

[8] Prior to *Ryder Memorial Hospital,* a party utilizing an altered NLRB ballot as part of its election propaganda was not obligated to include the Neutrality Statement or the Marking Disclaimer on the sample ballot. The potential interference caused by utilizing an unattributed altered NLRB ballot as election propaganda was analyzed on a case-by-case basis pursuant to *SDC Investments,* 274 NLRB 556, 557 (1985)(not misleading if source of altered ballot identified or, if unidentified, nature and contents of material reveal employees would not be mislead). By changing the law, the Board sought to eliminate litigation of this issue and, thus, eliminate the delay inherent in such litigation.

[9] *Ryder, supra,* 351 NLRB slip op. at 3.

[10] In utilizing English-only *Ryder* disclaimers, I further note that the Employer did not copy the sample ballots on the Notices of Election. The Notices of Election contain the *Ryder* disclaimer in three languages, no matter whether the Notice of Election is in English, Spanish, or Laotian. All of these Notices contain a sample ballot with the *Ryder* disclaimer written in three languages on each ballot.

Laotian. These Notices contained the two-sentence *Ryder* disclaimer in English, Spanish, and Laotian on the lower part of the Sample Ballot in the center of each tri-fold Notice.

The record does not reflect an exact number of employees who were unable to read the English-language *Ryder* disclaimer on the Employer's sample ballot. Various sorts of evidence of this kind were discussed during on and off the record conversations. However, neither of the parties had any specific facts or figures regarding unit employees' abilities to read English. Certainly the four witnesses produced by Petitioner testified that they were unable to read English. Moreover, Petitioner averred, and there is no reason to doubt, that it could produce additional witnesses to testify to the same inability to read English. The Employer agreed that many employees speak Spanish but had no estimate regarding abilities to read English.[11]

The issue is thus whether *Ryder* requires that the two-sentence disclaimer statement on a sample ballot utilized during an election campaign be printed in all languages utilized for official ballots. I find that it does.

Although utilization of foreign-language ballots is a discretionary matter,[12] *Ryder* mandates that any party utilizing an altered NLRB ballot during an election campaign communicate the NLRB's neutrality and its disclaimer of markings to the voters. The rule was adopted due to concern that if the Board's official ballot was reproduced and then altered, it might mislead employees into believing that the Board endorsed that party. The rule was made mandatory to avoid further litigation of representation matters, thus delaying certainty of election results.

Here, the Employer's altered ballot was posted prominently in the entrance, the security area, the time-clock area, and even in employee restrooms. All employees would have been able to observe the altered ballot. Further, although the Employer carefully translated much of its pre-election campaign materials and speeches into Spanish, there was no attempt to translate the *Ryder* disclaimer language into Spanish or Laotian. I reject any argument that this objection should be overruled due to the actual tally of ballots in a ratio of about 1 vote for the Petitioner to 2.7 votes against representation by the Petitioner. The closeness of the election as well as other factors enunciated in *Cambridge Tool & Mfg.*[13] are not relevant under the *Ryder* analysis.

Recognizing that the NLRB did not specifically enunciate a requirement that foreign-language *Ryder* disclaimers be present in any sample ballots distributed as campaign propaganda, the Employer argues that such an "extension" of *Ryder* be given prospective application only, while Petitioner argues that the Board did not intend its holding in *Ryder* solely for those voters who could read English. Petitioner argues that application of *Ryder* to the facts in this case does not amount to an "extension" of *Ryder.* Rather, Petitioner asserts that foreign-

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[11] There is no evidence regarding Laotian employees' ability to read English.

[12] See, NLRB Casehandling Manual, Part Two, Representation Proceedings, Sec. 11315; *NLRB v. Precise Castings,* 915 F.2d 1160 (7th Cir. 1990).

[13] 316 NLRB 716 (1995): the number of incidents, the severity of the incidents and whether they were likely to cause fear among unit employees, the number of unit employees subjected to the misconduct, proximity of misconduct to the election, degree to which misconduct persists in the minds of employees, extent of dissemination, effect of opposing party to cancel out the effects of original misconduct, closeness of the vote, degree to which misconduct can be attributed to the party.

language *Ryder* disclaimers are required implicitly in *Ryder.* Petitioner further argues that if a foreign-language *Ryder* disclaimer does constitute "extension" of *Ryder,* it should nevertheless be given retrospective effect.

For the reasons set forth below, I find in agreement with Petitioner, that requiring a foreign-language disclaimer on the sample ballots utilized herein is inherent in the holding in *Ryder.* Moreover, even were such a requirement not inherent in *Ryder,* I find that retroactive application of a foreign-language requirement does not work a manifest injustice.

In *Ryder,* the Board added the statement of the Board's neutrality and a disclaimer of any markings in order "to ensure that employees are not misled into believing that the Board favors a particular party to an election, and [to] reduce the likelihood of postelection litigation, thereby enhancing the finality of Board elections."[14] It is impossible to reach these goals without foreign-language *Ryder* disclaimers. Moreover, the foreign-language *Ryder* disclaimers were readily available to the Employer because they were already present on the Board's Notices of Election. Thus, I find that the use of foreign-language *Ryder* disclaimers does not constitute an extension of the *Ryder* decision.

Further, were such a requirement considered new or additional to the original *Ryder* decision, it would nevertheless deserve retroactive application. The parties agree that the relevant inquiry regarding retrospective application is a balance of the ill effects of retroactivity "against the mischief of producing a result which is contrary to a statutory design or to legal or equitable principles." *Securities & Exchange Commission v. Chenery,* 332 U.S. 194, 203 (1947). All decisions are applied retroactively, *Deluxe Metal Furniture Co.,* 121 NLRB 995, 1006-1007 (1958), unless retroactive application would cause manifest injustice. See, e.g., *SNE Enterprises,* 344 NLRB 673 (2005)(application of decision retroactively would not result in manifest injustice). Examination of the following factors is utilized to determine whether manifest injustice will occur: "reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the underlying law which the decision refines, and any particular injustice to the losing party under retroactive application of the law." *Pattern Makers (Michigan Model Mfrs.),* 310 NLRB 929, 931 (1993), citing *NLRB v. Bufco Corp.,* 899 F.2d 608, 609 (7th Cir. 1990).

Balancing these factors, I find that retroactive application of a foreign-language *Ryder* disclaimer requirement creates no manifest injustice. As to reliance on preexisting law, the Employer cites *Systrand Mfg. Corp.,* 328 NLRB 803 (1999), and *Dakota Premium Foods,* 335 NLRB 228 (2001), in which Spanish-language altered ballots were utilized without benefit of a Spanish-language statement of the NLRB's neutrality. In both cases, the Board adopted the hearing officers' recommendations based on the *SDC* case-by-case analysis[15] and held that the neutrality statement in the Notice of Election cured any defect in the sample ballots under the circumstances of those cases.

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[14] *Ryder, supra, 351 NLRB No. 26, slip op. at 3.*

[15] Thus, the Hearing Officer in *Systrand* relied upon *Worths Stores Corp.,* 281 NLRB 1191 (1986); *C. J. Krehbiel Co.,* 279 NLRB 855 (1986); and *Rosewood Mfg. Co.,* 278 NLRB 722 (1986). These cases, in turn, cited *SDC Investments,* 274 NLRB 566 (1985), as the appropriate framework for analysis of the issue. Although the Hearing Officer's Report is not included in *Dakota Premium Foods,* 335 NLRB 228 (2001), the Board notes that it adopts the hearing officer's application of *SDC. Id.* at n. 2.

These cases are unconvincing because they pre-date *Ryder, Ryder* specifically overruled the *SDC* case-by-case approach, and these cases dealt only with the Board's neutrality statement rather than the two-sentence neutrality statement plus disclaimer required by *Ryder*. If the Employer relied on *Ryder* to require that the disclaimer be written only in English, it has not advanced that argument here and, indeed, it would be difficult to understand such an argument. Based on these factors, I find the Employer relied upon precedent which could apply by analogy only. Thus, I find that this factor only weakly suggests injustice by retroactive application.

Regarding the effect of retroactivity on accomplishment of the purposes of the underlying law which the decision refines, a requirement of foreign-language *Ryder* disclaimers ensures the policies underlying the decision, i.e., it ensures that all employees understand the Board's neutrality and ensures that employees understand that the Board did not alter the ballot. Thus, I weight this factor as strongly suggesting the retroactive application of a foreign-language *Ryder* disclaimer.

Finally, I find there is no particular injustice to the Employer pursuant to retroactive application of a foreign-language *Ryder* disclaimer requirement. As in *SNE Enterprises,*[16] there will be no finding of unfair labor practices or an order to pay damages in this case. The result here, as in *SNE Enterprises,* will be invalidation of a prior election and order of a re-run election. Balancing all of these factors, I find no manifest injustice in retroactive application.

Accordingly, I recommend that Petitioner's Objection 1 be sustained.

Recommendation

I recommend that objections 5 and 6 be overruled and objection 1 be sustained. Due to violation of serious *Ryder Memorial Hospital* policy considerations, I recommend that the election conducted on December 13, 2007 in Case 32-RC-5539 be set aside and a new election be directed.[17] Further, I recommend that the following language be included in the Notice of Second Election in accordance with *The Lufkin Rule Co.,* 147 NLRB 341 (1964), and *Fieldcrest Cannon, Inc.,* 327 NLRB 109, 110 n. 3 (1993):

Notice to All Voters

The election conducted on December 13, 2008 was set aside because the National Labor Relations Board found that certain conduct of the Employer interfered with the employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that

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[16] 344 NLRB 673, 673-674 (2005).

[17] Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, D.C. within 14 days from the date of issuance of this Report and Recommendations. Exceptions must be received by the Board in Washington, D.C. by May 16, 2008. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof upon the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board may adopt this Recommended Report.

the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, free from interference by any of the parties.

Dated: Washington, D.C. May 2, 2008

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Mary Miller Cracraft
Administrative Law Judge